SUPREME COURT, U. S.
FEB 8 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 1040

QUINAULT TRIBE OF INDIANS,
Petitioner,

v.

A. M. GALLAGHER, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE MAKAH INDIAN TRIBE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAMES J. MCARDLE
ZIONTZ, PIETLE & FULLE
ROBERT L. PIETLE
ALVIN J. ZIONTZ
Attorneys for the Makah Indian Tribe
1201 Dexter Horton Building
Seattle, Washington 98104

METROPOLITAN PRESS — SEATTLE, WASH.

SUBJECT INDEX

	Page
Authority of Amicus to File Brief	1
Interest of the Amicus Curiae	2
Reasons for Granting the Writ of Certiorari	4
1. The attempted assumption of partial jurisdiction over the Makah Indian Tribe and its members by the State of Washington has rendered the Makah Indian Reservation a virtual jurisdictional checkerboard.	4
2. The attempted assumption of partial jurisdiction over the Makah Indian Tribe and its members by the State of Washington has created an intolerable problem of jurisdictional definition.	6
3. The attempted assumption of partial jurisdiction over the Makah Indian Tribe and its members by the State of Washington has resulted in an hiatus in law enforcement on the Makah Indian Reservation.	7
4. The failure of the attempted assumption of partial jurisdiction over the Makah Indian Tribe and its members by the State of Washington demonstrates the wisdom of Congress in requiring that such assumption of jurisdiction be made only upon the consent of the people of the State and be total in nature.	8
Conclusion	10

TABLE OF CASES

	Page
Makah Indian Tribe v. Clallam County, Clallam County cause number 16592	5, 7
Makah Indian Tribe v. State of Washington, Thurston County cause number 37537	5
State v. Coleman, Clallam County cause number 2831	5
State v. Mahone, Clallam County cause number 2763	5

STATUTES, CODES & RULES

	Page
Laws of 1963, Chapter 36	3, 4, 7, 9
Public Law 280	7, 8
R.C.W. Chapter 37.12	10
R.C.W. 37.12.010	3
37.12.010(3)	6
Rules on Appeal, Supreme Court Rule 42	1
25 Stat. 676 (1889)	8
48 Stat. 984	2
67 Stat. 588	8
18 U.S.C., Sec. 1162	8
25 U.S.C., Sec. 461	2
25 U.S.C., Sec. 476	2
28 U.S.C., Sec. 1360	8

IN THE

Supreme Court of the United States

October Term, 1966

No. .....

QUINAULT TRIBE OF INDIANS,
Petitioner,

v.

A. M. GALLAGHER, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE MAKAH INDIAN TRIBE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

AUTHORITY OF AMICUS TO FILE BRIEF

The Makah Indian Tribe files this brief as *Amicus Curiae* pursuant to Supreme Court Rule 42, a letter of consent of Jane Dowdle Smith, Assistant Attorney General of the State of Washington, dated December 12,

1966, on behalf of the respondents, and a letter of consent of Jerry C. Straus of Wilkinson, Cragun & Barker, dated January 25, 1967, on behalf of petitioner. Both letters of consent are on file herein.

INTEREST OF THE AMICUS CURIAE

The Makah Indian Tribe comprises approximately 700 enrolled Makah Indians who reside in the Makah Indian Reservation in the northwest corner of the Olympic Peninsula in the State of Washington. The interest of the Tribe, as *Amicus Curiae,* is to emphasize the importance of the instant case by apprising this court of the serious breakdown of law and order on the Makah Indian Reservation directly consequent to the attempted assumption of partial jurisdiction by the State of Washington over Washington Indians and Indian reservations.

The Makah Indian Tribe is a tribe, recognized by the Bureau of Indian Affairs and organized under the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C., Sec. 461, *et seq.* The Constitution and By-Laws of the Makah Indian Tribe of the Makah Indian Reservation, Washington, ratified and approved pursuant to 25 U.S.C. Sec. 476, establishes as the governing body of the Tribe a five-member tribal council, empowered

> "(i) To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Makah Indian Tribe, and providing for the maintenance of law and order, and the administration of justice by establishing a reservation Indian court, and defining its duties, powers, and limitations."

Consonant with its obligation and authority under the tribal constitution, the Makah Tribal Council enacted a

law and order code and has maintained the Makah Tribal Court for its enforcement since 1938. From 1938 until 1963, the maintenance of law and order on the Makah Indian Reservation proceeded in a normal and satisfactory manner, enforced for most of that period and at present by Tribal policemen who are employees of the Bureau of Indian Affairs. However, in 1963 the Tribe's tranquil exercise of self-government was shattered when the Legislature of the State of Washington—without the consent of the people of the State or the consent of the Tribe—enacted Chapter 36, Laws of 1963 (now codified as R.C.W. 37.12.010, *et seq.*), providing for partial assumption by the State of jurisdiction over Washington Indians when on trust or restricted reservation lands, limited to the following areas:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways.

This enactment, upheld by the Court of Appeals for the Ninth Circuit in the instant case, has spawned a plethora of complex jurisdictional problems resulting in the serious impairment to the maintenance of law and order on the Reservation that the Makah Indian Tribe now faces.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The attempted assumption of partial jurisdiction over the Makah Indian Tribe and its members by the State of Washington has rendered the Makah Indian Reservation a virtual jurisdictional checkerboard.

Within the boundaries of the Makah Indian Reservation are seven parcels of land held in fee simple by non-Indians, one parcel of land held in fee simple by the Makah Indian Tribe, a military reservation of the United States Guard, a United States Air Force station and a Job Corps Camp on leased tribal trust land, and numerous parcels of tribal trust land leased to non-Indians, in addition to tribal trust lands and allotments. Since under Chapter 36, state jurisdiction is total on non-trust land, but limited on trust land, it becomes readily apparent that determination of whether a Makah Indian performing any given act comes within the jurisdiction of the State of Washington presents a complex problem.

First, it must be decided whether the Indian acted on tribal or allotted trust land. If not, state jurisdiction obtains, but if so, it must then be decided whether the Indian acted within one of the eight enumerated areas of state jurisdiction. The difficulty of the latter task is best illustrated by the problems arising out of the last of those areas, "operation of motor vehicles upon the public streets, alleys, roads and highways."

The Makah Indian Tribe contends that the State could not possibly have jurisdiction over operation of motor vehicles on the Reservation since no *state* public highway exists on the Reservation. However, deputy sheriffs

of Clallam County have arrested two enrolled Makah Indians for alleged illegal operation of motor vehicles on *tribal roads* on the Reservation.

In the first case, *State v. Mahone,* Clallam County cause number 2763, the Makah Indian was convicted in a state justice court and was pursuing an appeal in the superior court at the time of his death. In the second case, *State v. Coleman,* Clallam County cause number 2831, the Makah Indian was convicted in a state justice court and appealed to the Superior Court for Clallam County which dismissed the charges on the grounds that the State's attempted assumption of jurisdiction was invalid, and that no state public highway existed on the Reservation. The State appealed to the Washington Supreme Court but later dismissed its own appeal.

As a result, the Tribe then filed *Makah Indian Tribe v. State of Washington,* Thurston County cause number 37537, seeking a declaratory judgment to the effect that the State of Washington has not validly assumed jurisdiction over the Tribe and that, even granting that the State's jurisdiction is valid, the State may not govern operation of motor vehicles on the Reservation since no state public highways exist on the Reservation. The Superior Court for Thurston County ruled against the Tribe on both points and the case is now on appeal to the Washington Supreme Court as docket number 39398.

Regardless of the outcome of the Tribe's declaratory judgment action, it is clear that a law enforcement officer could not possibly be expected to enforce State laws on the Reservation without the use of a tract book, and in some instances, a professional survey, to aid him in determining the applicability of State jurisdiction.

2. The attempted assumption of partial jurisdiction over the Makah Indian Tribe and its members by the State of Washington has created an intolerable problem of jurisdictional definition.

Implicit in the State's attempted assumption of limited jurisdiction is the conclusion that tribal jurisdiction on tribal or allotted trust lands continue in all areas other than the eight enumerated in the statute. And yet the mere fact of the limitation has so blurred the lines of jurisdiction between the Tribe and the State as to make impossible the effective functioning of either government.

A case in point is "domestic relations," (R.C.W. 37.12.-010 (3)). Does the State's assumption of jurisdiction in this area impose state community property laws on the Reservation? And if a Makah wife is married to a non-Makah husband, is their property on the Reservation therefore subject to state tax? The Superior Court for Clallam County apparently answered both these questions affirmatively in *Makah Indian Tribe v. Clallam County*, Clallam County cause number 16592.

The case arose out of an attempt by Clallam County to tax real and personal property acquired and used by an enrolled Makah Indian wife and her non-Makah husband solely on tribal trust land on the Reservation. By federal law and the tribal constitution, the Tribe has the power to exclude non-Makahs from the Reservation, to prescribe conditions upon which they shall be permitted to reside on the Reservation, and to regulate the use and disposition of property upon the Reservation. By tribal custom, a non-Makah spouse may reside upon the Reservation only if he agrees that such property as the property in question is the sole property of the Makah spouse.

Despite federal law and tribal custom, the superior court ruled that all the property of the husband and wife is community property subject to state tax. The Tribe has appealed the case to the Washington Supreme Court as docket number 39013.

This example could be multiplied by many others to demonstrate the effect of the refusal of the State of Washington to assume the total jurisdiction contemplated by Public Law 280. Even matters of traditional tribal jurisdiction not in any of the eight enumerated areas of state jurisdiction may lie within their penumbra, but the Tribe cannot know with any certainty whether it does have jurisdiction in such a particular case. It seems clear to us that this is precisely the evil Congress sought to cure by Public Law 280.

3. The attempted assumption of partial jurisdiction over the Makah Indian Tribe and its members by the State of Washington has resulted in an hiatus in law enforcement on the Makah Indian Reservation.

The Makah Tribal Council and members of the Tribe are much alarmed at serious lapses of law enforcement on the Reservation which have occurred since the passage of Chapter 36, Laws of 1963 (now codified as R.C.W 37.12.010, *et seq.*).

Subsequent to the enactment of Chapter 36, the Attorney General of the State of Washington ruled that state jurisdiction was exclusive and that the Tribe is foreclosed from exercising any further jurisdiction in the eight areas enumerated in the statute. Thereupon the Bureau of Indian Affairs instructed the tribal policemen, who are

Bureau employees, not to enforce tribal ordinances relating to the eight enumerated areas. Simultaneously, Clallam County officials admitted that the County lacked sufficient funds to provide law enforcement on the Reservation. The result was a period during which no traffic regulations, tribal or state, were enforced on the Reservation, and a number of serious accidents resulted.

Although opposed to state regulation of operation of motor vehicles on the Reservation, the Makah Tribal Council is concerned that lives and property be protected. At present both federal and state authorities are reluctant to maintain needed law enforcement on the Reservation and an intolerable situation continues.

4. The failure of the attempted assumption of partial jurisdiction over the Makah Indian Tribe and its members by the State of Washington demonstrates the wisdom of Congress in requiring that such assumption of jurisdiction be made only upon the consent of the people of the State and be total in nature.

In the act enabling the State of Washington, 25 Stat. 676 (1889), Congress required a constitutional disclaimer of jurisdiction over Indians and Indian lands, irrevocable without the consent of the United States and the "people" of the State. In 1953, noting the constitutional disclaimer, Congress, in enacting Public Law 280 (67 Stat. 588, 18 U.S.C., Sec. 1162; 28 U.S.C., Sec. 1360), provided that the State could assume jurisdiction over Indians and Indian reservations upon amendment of its constitution—a method obviously designed to require submission of the matter to a vote of the people of the State. Congress further required that the assumption of

jurisdiction be "to the same extent" as jurisdiction exercised elsewhere within the State and that criminal law and civil laws of general application have the "same force and effect" within Indian reservations as elsewhere in the State.

However, the Legislature of the State of Washington chose to ignore the clear mandate of Congress in each regard in enacting Chapter 36. As outlined in the foregoing arguments, the result is a jurisdiction which Clallam County is not ready to assume over the Makah Indian Tribe and Reservation. The County's reluctance to obey the enactments of the state legislature indicates that if the State's assumption of jurisdiction were submitted to a vote of the people it would probably fail.

A second result of the legislature's rash enactment is a jurisdiction impossible of precise definition and thus wholly inadequate as a foundation for responsible law enforcement on the Makah Reservation.

CONCLUSION

The invalid enactment of Chapter 37.12 of the Revised Code of Washington and its inherent jurisdictional uncertainties make it imperative that this court issue a Writ of Certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered in the instant case on November 10, 1966.

Respectfully submitted,

JAMES J. MCARDLE
ZIONTZ, PIRTLE & FULLE
ROBIN L. PIRTLE
ALVIN J. ZIONTZ
Attorneys for the
Makah Indian Tribe